

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

United States of America

v.

Criminal Action No. 1:09-CR-37

Christopher D. Brumett

REPORT AND RECOMMENDATION
(Doc. 52)

Defendant Christopher Brumett has filed a motion to vacate, set aside, or correct his sentence pursuant to the provisions of 28 U.S.C. § 2255. (Doc. 52.) This is Brumett's second Section 2255 motion pertaining to his conviction for traveling in interstate commerce and failing to update his registration under the Sex Offender Registration and Notification Act, in violation of 18 U.S.C. § 2250(a). As in his prior motion, Brumett erroneously asserts that he was convicted of a federal misdemeanor offense and that he should have been sentenced accordingly, or alternatively, his conviction should be vacated. His first motion was denied earlier this year on both procedural and substantive grounds. *United States v. Brumett*, No. 1:09-cr-00037-jgm-1, 2010 WL 3937624 (D. Vt. Oct. 6, 2010). There was no appeal.

Because Brumett previously filed a Section 2255 motion regarding the same conviction and sentence, and that motion was denied on the merits, his current motion is "second or successive" and cannot be filed without permission from the court of appeals. 28 U.S.C. § 2255(h) ("A second or successive motion must be certified as provided in section 2244 . . ."). The Second Circuit has instructed that when a district court receives

a second or successive Section 2255 motion, it should transfer the motion to the court of appeals pursuant to 28 U.S.C. § 1631. *See Liriano v. United States*, 95 F.3d 119, 122-23 (2d Cir. 1996). The Circuit will certify the motion if it contains “newly discovered evidence” or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h). If certified, the motion may then be heard by this Court.

I therefore recommend that the Court find Brumett’s current Section 2255 motion to be second or successive, and TRANSFER the motion (Doc. 52) to the Second Circuit pursuant to 28 U.S.C. § 1631.

Dated at Burlington, in the District of Vermont, this 22nd day of December, 2010.

/s/ John M. Conroy
John M. Conroy
United States Magistrate Judge

Any party may object to this Report and Recommendation within fourteen days after service thereof, by filing with the Clerk of the Court and serving on the Magistrate Judge and all parties, written objections which shall specifically identify those portions of the Report and Recommendation to which objection is made and the basis for such objections. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2), 6(a), 6(d); L.R. 72(c). Failure to timely file such objections operates as a waiver of the right to appellate review of the District Court’s adoption of such Report and Recommendation. *See* Fed. R. Civ. P. 72(a); *Small v. Sec’y of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).